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[REDACTED]

**STATE OF WISCONSIN**  
**Division of Hearings and Appeals**

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In the Matter of

[REDACTED]  
[REDACTED]  
[REDACTED]

**DECISION**  
Case #: FOF - 174122

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**PRELIMINARY RECITALS**

On May 5, 2016, the below named Petitioner filed a hearing request under Wis. Admin. Code §HA 3.03, and 7 C.F.R. § 273.16, to disqualify the Respondent from the FoodShare Program for a period of one year. The hearing was held on June 17, 2016, in Milwaukee, Wisconsin.

The issue for determination is whether the Respondent committed an Intentional Program Violation.

NOTE: Judicial notice is being taken of the plea agreement and conviction in case [REDACTED] from the Federal District Court

There appeared at that time the following persons:

**PARTIES IN INTEREST:**

Petitioner:

Department of Health Services  
1 West Wilson Street, Room 651  
Madison, WI 53703

By: [REDACTED], Income Maintenance Specialist Advanced  
Milwaukee Enrollment Services  
1220 W. Vliet St., Room 106  
Milwaukee, WI 53205

Respondent:

[REDACTED]  
[REDACTED]  
[REDACTED]

**ADMINISTRATIVE LAW JUDGE:**

Mayumi Ishii  
Division of Hearings and Appeals

### **FINDINGS OF FACT**

1. Petitioner (CARES # [REDACTED]) is a resident of Milwaukee County who received FoodShare benefits from July 2012 through November 2012. She typically received her benefits on the 11th of the month and received \$381 to \$385 per month in benefits. (Exhibit 5)
2. On June 7, 2012 the Respondent completed a renewal; and June 8, 2012, the agency sent the Respondent an Eligibility and Benefits booklet that warned her about the consequences of selling or trading her benefits, including disqualification from the program. (Exhibits 7, 9 and 10)
3. In August 2010, the owner of [REDACTED] became an authorized SNAP vendor, but he was no longer a subcontractor distributing seafood and meat. Instead, he was purchasing FoodShare benefits for cash, paying the benefit recipients only a percentage of the face value of the card. The recipients did not receive any food items. This conduct continued until January 2013. (Exhibit 11)
4. On October 11, 2012, an EBT card ending in [REDACTED] and attributed to the Respondent was used to make a \$100 "purchase" with [REDACTED] (Exhibit 13)
5. The card ending in [REDACTED] was issued to the Respondent, who was in the possession of the card until about a month and half prior to the hearing, when she had it replaced because it was damaged. (Testimony of the Respondent; Exhibit 12)
6. On May 16, 2015, Milwaukee Enrollment Services (the agency) prepared an Administrative Disqualification Hearing notice, alleging that the Respondent trafficked \$100 in benefits with [REDACTED] on October 11, 2012. (Exhibit 3)

### **DISCUSSION**

#### *Respondent's Non-appearance*

The Respondent did not appear for this hearing. This circumstance is governed by the regulation in 7 C.F.R. §273.16(e)(4), which states in part:

If the household member or its representative cannot be located or fails to appear at a hearing initiated by the State agency without good cause, the hearing shall be conducted without the household member being represented. *Even though the household member is not represented, the hearing official is required to carefully consider the evidence and determine if intentional Program violation was committed based on clear and convincing evidence.* If the household member is found to have committed an intentional program violation but a hearing official later determines that the household member or representative had good cause for not appearing, the previous decision shall no longer remain valid and the State agency shall conduct a new hearing. The hearing official who originally ruled on the case may conduct a new hearing. In instances where the good cause for failure to appear is based upon a showing of nonreceipt of the hearing notice, the household member has 30 days after the date of the written notice of the hearing decision to claim good cause for failure to appear. In all other instances, *the household member has 10 days from the date of the scheduled hearing to present reasons indicating a good cause for failure to appear. A hearing official must enter the good cause decision into the record.*

*Emphasis added*

The hearing in this case took place on June 17, 2016. The Respondent was advised of the date and time of the hearing, in an Administrative Disqualification Hearing Notice that was sent to her at an address on 16<sup>th</sup> Street. [REDACTED] indicated that this was the Respondent's last known mailing address and that the Respondent had an open FoodShare case. [REDACTED] further indicated that the agency did not receive any returned mail.

The Respondent did not appear at the hearing and the Respondent did not contact the Division of Hearings and Appeals within 10 days to explain her failure to appear. As such, it is found that the Respondent did not have good cause for her non-appearance.

*What is an IPV?*

An IPV is defined at 7 C.F.R. §273.16(c) as intentionally: making a false or misleading statement or misrepresenting; concealing or withholding facts; or committing any act that constitutes a violation of the Food Stamp Act, federal regulations or any Wisconsin statute relating to the use, presentation, transfer, acquisition, receipt or possession of food stamp coupons or an authorization to participate (ATP) card.

The Department's written policy restates federal law, below:

**3.14.1 IPV Disqualification**

7 CFR 273.16

A person commits an Intentional Program Violation (IPV) when s/he intentionally:

1. makes a false or misleading statement, or misrepresents, conceals or withholds facts; or
2. commits any act that constitutes a violation of the Food Stamp Act, the Food Stamp Program Regulations, or any Wisconsin statute for the purpose of using, presenting, transferring, acquiring, receiving, possessing or trafficking of FoodShare benefits or QUEST cards.

An IPV may be determined by the following means:

1. Federal, state, or local court order,
2. Administrative Disqualification Hearing (ADH) decision,
3. Pre-charge or pretrial diversion agreement initiated by a local district attorney and signed by the FoodShare recipient in accordance with federal requirements, or
4. Waiver of the right to an ADH signed by the FoodShare recipient in accordance with federal requirements.

*FoodShare Wisconsin Handbook, §3.14.1.*

The agency may disqualify only the individual who either has been found to have committed the IPV or has signed a waiver or consent agreement, and not the entire household. If disqualified, an individual will be ineligible to participate in the FS program for one year for the first violation, two years for the second violation, and permanently for the third violation. However, any remaining household members must agree to make restitution within 30 days of the date of mailing a written demand letter, or their monthly allotment will be reduced. 7 C.F.R. §273.16(b).

*What is the Agency's Burden of Proof?*

In order for the agency to establish that an FS recipient has committed an IPV, it has the burden to prove two separate elements by clear and convincing evidence. The recipient must have: 1) committed; and 2) intended to commit an intentional program violation per 7 C.F.R. §273.16(e)(6).

"Clear and convincing evidence" is an intermediate standard of proof which is more than the "preponderance of the evidence" used in most civil cases and less than the "beyond a reasonable doubt" standard used in criminal cases.

In Kuehn v. Kuehn, 11 Wis.2d 15, 26 (1959), the court held that:

Defined in terms of quantity of proof, reasonable certitude or reasonable certainty in ordinary civil cases may be attained by or be based on a mere or fair preponderance of the evidence. Such certainty need not necessarily exclude the probability that the contrary conclusion may be true. In fraud cases it has been stated the preponderance of the evidence should be clear and satisfactory to indicate or sustain a greater degree of certitude. Such degree of certitude has also been defined as being produced by clear, satisfactory, and convincing evidence. Such evidence, however, need not eliminate a reasonable doubt that the alternative or opposite conclusion may be true. In criminal cases, while not normally stated in terms of preponderance, the necessary certitude is universally stated as being beyond a reasonable doubt.

*Wisconsin Jury Instruction – Civil 205* is also instructive. It provides:

Clear, satisfactory and convincing evidence is evidence which when weighed against that opposed to it clearly has more convincing power. It is evidence which satisfies and convinces you that "yes" should be the answer because of its greater weight and clear convincing power. "Reasonable certainty" means that you are persuaded based upon a rational consideration of the evidence. Absolute certainty is not required, but a guess is not enough to meet the burden of proof. This burden of proof is known as the "middle burden." The evidence required to meet this burden of proof must be more convincing than merely the greater weight of the credible evidence but may be less than beyond a reasonable doubt.

Further, the *McCormick* treatise states that "it has been persuasively suggested that [the clear and convincing evidence standard of proof] could be more simply and intelligibly translated to the jury if they were instructed that they must be persuaded that the truth of the contention is highly probable." 2 *McCormick on Evidence* § 340 (John W. Strong gen. ed., 4<sup>th</sup> ed. 1992).

Thus, in order to find that an IPV was committed, the trier of fact must derive from the evidence, a firm conviction as to the existence of each of the two elements even though there may exist a reasonable doubt that the Respondent committed the IPV.

*The Merits of the Agency's Case*

In the case at hand, Milwaukee Enrollment Services (the agency) alleges that the Respondent sold \$100 worth of benefits on October 11, 2012.

The Respondent did not dispute the fact that a fraudulent purchase was made with her EBT card on October 11, 2012, in the amount of \$100. However, the Respondent claims she was the victim of a con-

man. The Respondent claims that in October 2012 she was visiting with her son, who was incarcerated at [REDACTED]. The Respondent testified that while there, she was approached by a man who said he could deliver to inmates meat care packages that included Polish sausages and summer sausages. The Respondent testified that the man gave her his phone number by calling her cell phone and that sometime later, she called him and placed an order for \$50.00 over the phone. The Respondent testified that she gave the man her EBT card number and pin number. The Respondent claims that the man then actually charged \$100 to her card and that her son never got the sausages. The Respondent testified that she then tried to call the man, but the phone number was no longer in service anymore.

The Respondent's testimony is not credible. First, it is highly unlikely that a correctional institution is going to allow an inmate to receive a meat care package that includes Polish sausages which require refrigeration and must be cooked. Second, when asked for proof of the man's number in her cell phone, the Respondent indicated, conveniently, that she no longer had the number or phone. Third, it is simply not believable that anyone would give a complete stranger their EBT card number and pin number over the phone, and then when defrauded would not take action to get a new EBT card or change the pin number to prevent future fraudulent purchases. It is undisputed that the Petitioner kept the same EBT card until very recently. Further, the case comments contain no entries between June 2012, when it indicates the Respondent completed a renewal and December 2012 when it indicates the Respondent completed her six month report form, so there is no evidence the Respondent contacted the agency about any one cheating her out of her benefits in October 2012. (See Exhibit 7)

Looking at the credible evidence in the record, it is found that the agency has established, by clear and convincing evidence, that the Respondent was selling her FoodShare benefits on October 11, 2012.

First, the Respondent redeemed benefits in a whole dollar amount, \$100. This makes it less likely she made a legitimate food purchase. Second, the transaction took place on the 11<sup>th</sup> of the month when the Respondent received her benefits. Only the Respondent should have had that information. Third, the EBT card that was used was not replaced by the Respondent until May 2016, four years after the subject transactions making it unlikely the Respondent's card was lost or stolen on October 11, 2012. Fourth, during this time, [REDACTED] was no longer a subcontractor distributing meat and seafood; it/he was instead purchasing EBT benefits for a fraction of face value. As such, the Respondent had to have been selling her benefits.

Based upon the foregoing, it is found that the Respondent was trafficking her FoodShare benefits on October 11, 2012.

There is a general rule that a person is presumed to know and intend the probable and natural consequences of his or her own voluntary words or acts. See John F. Jelke Co. v. Beck, 208 Wis. 650 (1932); 31A C.J.S. Evidence §131. Intention is a subjective state of mind to be determined upon all the facts. Lecus v. American Mut. Ins. Co. of Boston, 81 Wis.2d 183 (1977).

The agency's evidence with regard to intent is a little shaky. Per 7 CFR 273.16(d), "...The State agency shall inform the household in writing of the disqualification penalties for intentional program violation each time it applies for program benefits. The penalties shall be in clear, prominent and bold face lettering on the application form."

The agency did not provide a copy of an application that the Respondent completed prior to October 2012, to show she was given notice as required by the Federal Regulations. However, it is this examiner's understanding that the general practice of the agency is to mail an Eligibility and Benefits Booklet after an application has been completed, and in June 2012 after Respondent completed a renewal, the agency did send the Respondent an Eligibility and Benefits booklet that warned her about the consequences of selling her benefits. (See Exhibits 7, 9 and 10) Still, the Respondent went ahead and

sold her benefits, anyway. Based upon the foregoing, it is found that the Respondent intentionally violated the rules of the FoodShare program by selling her benefits on October 11, 2012.

I note that the Respondent did not make any credible claim that she was unaware that selling her benefits was against the rules and could result in disqualification from the FoodShare program.

### **CONCLUSIONS OF LAW**

The Respondent committed an intentional program violation (IPV) by trafficking her benefits with [REDACTED] on October 11, 2012.

**THEREFORE, it is**

### **ORDERED**

That the IPV for claim number [REDACTED] is sustained and that the Respondent is hereby ineligible to participate in the FoodShare program for a period of one year, effective the first month following the date of receipt of this decision.

### **REQUEST FOR A REHEARING ON GROUNDS OF GOOD CAUSE FOR FAILURE TO APPEAR**

In instances where the good cause for failure to appear is based upon a showing of non-receipt of the hearing notice, the respondent has 30 days after the date of the written notice of the hearing decision to claim good cause for failure to appear. See 7 C.F.R. sec. 273.16(e)(4). Such a claim should be made in writing to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875.

### **APPEAL TO COURT**

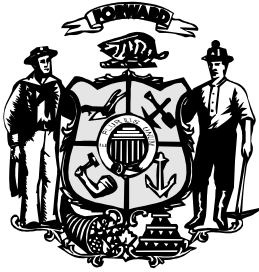
If you disagree with this decision, you may appeal this decision to Circuit Court in the county where you live. Appeals must be served and filed with the appropriate court no more than 30 days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

For purposes of appeal to circuit court, the Respondent in this matter is the Department of Health Services. After filing the appeal with the appropriate court, it must be served on the Secretary of that Department, either personally or by certified mail. The address of the Department is: 1 West Wilson Street, Room 651, Madison, Wisconsin 53703. A copy should also be sent to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for appeals to the Circuit Court is in Wis. Stat. §§ 227.52 and 227.53.

Given under my hand at the City of Milwaukee,  
Wisconsin, this \_\_\_\_\_ day of July, 2016.

\s \_\_\_\_\_  
Mayumi Ishii  
Administrative Law Judge  
Division of Hearings and Appeals

**State of Wisconsin\DIVISION OF HEARINGS AND APPEALS**

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The preceding decision was sent to the following parties on July 15, 2016.

Milwaukee Enrollment Services  
Public Assistance Collection Unit  
Division of Health Care Access and Accountability  
[REDACTED]@dhs.wisconsin.gov